IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 27/07
CRC 24/06

IN THE MATTER OF	a challenge to part of a determination of the Employment Relations Authority
BETWEEN	SOUTH TRANZ LTD D J SHACKLETON A E HARWOOD Plaintiffs
AND	STRAIT FREIGHT LIMITED Defendant

Hearing: 14 March 2007
(Heard at Christchurch)

Court: Chief Judge G L Colgan
Judge C M Shaw
Judge A A Couch

Appearances: S E England, Counsel for Plaintiff
P D Barrett, Counsel for Defendant

Judgment: 29 November 2007

JUDGMENT OF THE FULL COURT

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[1] This case is about the extent of the jurisdiction of the Employment Relations Authority to grant remedies for breach of a settlement agreement properly completed under s149 of the Employment Relations Act 2000.

[2] In its determination given on 24 July 2006 (CA 107/06) the Authority found that the plaintiffs had breached the terms of such a settlement. It ordered the plaintiffs to refrain from any further breaches of the agreement. They do not question the Authority's jurisdiction to make that order.

[3] The Authority also ordered the plaintiffs to account for profits of their business and to pay some of those profits to the defendant together with interest. The plaintiffs challenge the Authority's jurisdiction to make those orders. The defendant seeks to uphold all aspects of the Authority's determination.

[4] As the proceedings raised an important question of law affecting the Authority's jurisdiction and involving the interpretation of key provisions of the Employment Relations Act 2000, the case was heard by a full Court. It proceeded by way of a hearing of specific issues only against a background of facts which were not in dispute.

Background facts and history of the proceedings

[5] The defendant has operated a road transport business for some years. Mr Shackleton and Ms Harwood owned two companies, Tranzfreight Ltd and Bulk Freight Ltd, which were also in the business of road transport. In or about March 2003, the defendant entered into a contract to purchase most of the assets of those two companies. That agreement was entered into by the defendant on behalf of a company to be formed as Tranz Freight 2004 Ltd. Mr Shackleton and Ms Harwood were not parties to that sale and purchase agreement but it provided that they were both to be employed by the defendant following settlement of the agreement between the companies who were parties to it. It was expressly agreed that this employment was to be subject to a restraint of trade restricting Mr Shackleton and Ms Harwood's ability to compete with the defendant or its group of companies.

[6] Mr Shackleton and Ms Harwood retained a small number of vehicles which were to be operated by a company called South Tranz Ltd which they then formed. That company entered into an agreement with Tranz Freight 2004 Ltd to provide two tractor units on contract to that company for its work.

[7] With some changes, the agreement for sale and purchase of the assets of Tranzfreight Ltd and Bulk Freight Ltd was settled on 3 May 2004 and Mr Shackleton and Ms Harwood became employed by the defendant the same day. Subsequently they signed employment agreements, each of which contained a

covenant in restraint of trade for a period of 5 years. The meaning to be given to those covenants and the time for which they were to remain in effect were the subject of collateral correspondence between the parties at the time the employment agreements were signed.

[8] In July 2004, Mr Shackleton resigned his employment with the defendant. Subsequently, Ms Harwood gave notice of her intention to resign on 17 December 2004.

[9] On 28 October 2004, the defendant cancelled its contract with South Tranz Ltd. Mr Shackleton and Ms Harwood claimed that this caused the covenants in restraint of trade to be of no further effect.

[10] Some time after this, the defendant issued proceedings in the Authority alleging that Ms Shackleton and Ms Harwood had breached the covenants because their company, South Tranz Ltd, had engaged in certain road transport work within the scope of the prohibition in the covenants. The defendant sought interim injunctions restraining them both from further breaches of the covenants. In a determination given on 17 December 2004 (CA 160/04), the Authority granted an interim injunction against Mr Shackleton but declined to do so against Ms Harwood.

[11] The parties were then directed to mediation which took place on two occasions in January and February 2005 with the assistance of a mediator appointed to provide services under s144 of the Employment Relations Act 2000.

[12] The parties reached agreement at mediation. The terms that agreement were set out in a written record of settlement which was executed in accordance with the requirements of s149 of the Employment Relations Act 2000.

[13] The record of settlement only named as parties Strait Freight Limited as the applicant and Mr Shackleton and Ms Harwood as respondents. What were then recorded as the agreed terms of settlement, however, included the following:

> *2) Settlement is binding on all three Strait Freight companies, all three of the respondents' companies and the respondents personally.*

3) *This is a full and final settlement of all current disputes between the parties and/or the above companies in any jurisdiction.*

[14] The terms of settlement then went on to confer benefits and impose obligations on those other companies as well as the parties to the proceedings before the Authority. This included terms dealing with issues arising out of the commercial transactions involving those other companies.

[15] Clause 5 of the record of settlement provided that Mr Shackleton and Ms Harwood would be subject to a restraint of trade for two years in terms set out in the record. Those terms explicitly restrained not only those two people but also their "group of companies" from carrying out certain road freight work. This included a qualified restraint on undertaking work in competition with the defendant or its "group of companies" and on certain "kingpin towing work".

[16] In August 2005, the defendant lodged proceedings in the Authority alleging that each of the plaintiffs had breached the terms of the restraint of trade contained in the record of settlement by carrying freight for customers of the defendant and by undertaking certain work said to be "kingpin towing". The plaintiffs denied those allegations.

[17] The Authority held an investigation meeting on 27 October 2005. On 24 July 2006, the Authority issued a determination in which it found that the plaintiffs had breached the terms of the record of settlement as alleged by the defendant and made the following orders:

[1] The respondents are to immediately desist from undertaking cartage work which is in breach of the record of settlement including any such work booked from the date of this determination.

[2] The respondents are ordered to account for the profits earned between 15 February 2005 and the date of this determination.

[3] The respondents are to pay the applicant the sum of the profits garnered from their unlawful transactions during this period.

[4] The respondents are to pay the applicant interest on the sum determined at a rate of 8.5% per annum.

[18] There were originally two aspects to plaintiffs' election to have the matter heard by the Court. Firstly, they challenged the Authority's finding of fact that they were in breach of the terms of the record of settlement. Secondly, they challenged the jurisdiction of the Authority to make the orders in paragraphs [2], [3] and [4] above.

[19] When it became apparent that the matter was unlikely to be heard before the restraint of trade imposed by the record of settlement expired, the plaintiffs abandoned their challenge to the findings of fact and filed an amended statement of claim raising solely the jurisdictional issue.

Key statutory provisions

[20] The Employment Relations Authority is a statutory tribunal. It has no inherent jurisdiction and can only carry out functions and exercise powers to the extent that they are conferred on it by statute. Whether the Authority had jurisdiction to make the orders in question, therefore, must be answered by an analysis of the relevant statutory provisions. With few exceptions not relevant to this case, those provisions are contained in the Employment Relations Act 2000.

[21] The Act provides a statutory scheme for mediation of work related problems and for terms of settlement reached through mediation to be formally recorded. It is common ground in this case that the record of settlement was validly signed by a mediator empowered to do so. As a result, the following provisions of s149 apply:

> ***149 Settlements***
>
> …
>
> *(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—*
>
> *(a) those terms are final and binding on, and enforceable by, the parties; and*
>
> *(ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and*
>
> *(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the Court, whether by action, appeal, application for review, or otherwise.*

(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[22] A further result is that s151 applies. It provides:

> ***151 Enforcement of terms of settlement agreed or authorised***
>
> *Any agreed terms of settlement that are, under section 149(3), enforceable by the parties and any decision that, under section 150(3), is enforceable by the parties, may be enforced—*
>
> *(a) by compliance order under section 137; or*
>
> *(b) in the case of a monetary settlement, in 1 of the following ways:*
>
> *(i) by compliance order under section 137:*
>
> *(ii) by using, as if the settlement or decision were an order enforceable under section 141, the procedure applicable under section 141.*

Submissions of counsel

[23] The helpful submissions made by both Mr England and Mr Barrett, began with similar propositions which we accept. Section 49(3)(b) limits proceedings based on a mediated settlement to those which are for "enforcement purposes". That expression should be construed as a reference to the options available under s151. As the breach found by the Authority did not relate to a monetary settlement, s151(b) did not apply. The jurisdiction conferred on the Authority in the present case was therefore limited to making a compliance order.

[24] Applying the definition in s5, the reference in s151(a) to a "compliance order" is, in the case of the Authority, a reference to an order made under s137. That section applies where any person has not observed or complied with any of a wide range of statutory and contractual obligations set out in s137(1), including "*any terms of settlement or decision that section 151 provides may be enforced by compliance order"*. Section 137(2) then goes on to provide:

> *(2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity,*

> *for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.*

[25] It was further common ground that the first order made by the Authority was of the type specifically authorised by s137(2) and that the Authority was therefore within its jurisdiction to make that order. We agree and note that it was for this reason that the plaintiffs did not challenge the making of that order.

[26] At this point the arguments presented by counsel diverged.

[27] For the defendant, Mr Barrett submitted:

> *20. The phrase "in addition to any other powers it may exercise" makes it clear that the exercise of additional powers is discretionary.*
>
> *21. Further, any additional powers the Authority exercises pursuant to s.137(2) form part of the "compliance order".*

[28] Building on this foundation, Mr Barrett then submitted:

> *23. The sources of the other powers the Authority has a discretion to make under s.137(2) are derived from:*
>
> *(a) s.138(4) of the Act which provides that compliance orders may be subject to such terms and conditions the Authority thinks fit; which gives the Authority wide discretionary powers; and*
>
> *(a) s.162 of the Act which provides that, subject to ss. 63 and 164, the Authority may, in any matter before it in relation to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts.*

[29] As to the orders that a District Court or the High Court may make in relation to contracts, Mr Barrett referred us to the summary of interests an innocent party may have following a breach of contract adopted by Fisher J in *Newmans Tours Limited v Ranier Investments Limited* [1992] 2 NZLR 68. He submitted that the orders made by the Authority recognised what are characterised in this decision was the restitution and reliance interests of the defendant. Mr Barrett also relied on the decision of the House of Lords in *Attorney General v Blake* [2001] AC 268 for the proposition that an account of profits is a remedy which may be awarded for breach of contract.

[30] For the plaintiff, Mr England submitted that the words ”in addition to any other power it may exercise” in s137(2) referred to any other powers the Authority might exercise in respect of any of the matters referred to in s137(1)(a) and were not intended to confer jurisdiction in addition to that set out in s137(2).

[31] Mr England gave a similar response to Mr Barrett’s argument based on s138(4). He submitted that a power to impose terms and conditions on a compliance order did not confer any additional jurisdiction on the Authority and, in particular, did not give the Authority power to award damages as part of a compliance order.

[32] As to s162, Mr England’s primary submission was that a claim based on a breach of a mediated settlement was not a “matter related to an employment agreement” and that s162 therefore did not apply. In the alternative, he submitted that an account of profits was equitable in nature and not an order which a District Court or the High Court might make under any rule of law relating to contracts.

Discussion and decision

[33] It was unclear from Mr Barrett’s submissions exactly how he was suggesting that the words “in addition to any other power it may exercise” in s137(2) should be construed. If his submission was that they confer additional jurisdiction on the Authority over and above that conferred by the balance of s137(2), we do not accept that submission. To effectively confer a power, the legislative language must be clear and specific. It seems to us that the purpose of the expression is, as Mr England submitted, simply a matter of clarification. What it makes clear is that the power to make an order of the kind referred to in s137(2) was not intended to be in substitution for other powers the Authority might have in respect of any particular matter but in additions to those other powers. Thus the expression recognises jurisdiction expressly conferred elsewhere.

[34] An example of this would be a case in which it is established that an employer has incorrectly calculated an employee’s wages in breach of their employment agreement. In such circumstances, the Authority may make an order under s131 for the payment of arrears of wages. What the expression “in addition to

any other power it may exercise" in s137(2) then makes clear is that the Authority may also make a compliance order directing the employer to calculate and pay the employee's wages appropriately in future.

[35] In the alternative, it may be that Mr Barrett was suggesting that, to the extent that the Authority makes any orders in the exercise of other powers, the expression "in addition to any other power it may exercise" in s137(2) has the effect of making all such orders part of the order made under s137(2). We reject that proposition. It requires a strained meaning of the words used when their ordinary meaning serves the perfectly sensible purpose we have set out above. It also produces an illogical result. Using the example already given, it makes no sense to say that an order for payment of arrears of wages made under s131 somehow becomes an order made under s137 if the Authority also makes an order under s137(2) for future compliance with the employment agreement.

[36] Thus, we reject the proposition that the words "in addition to any other power it may exercise" in s137(2) have the effect of bringing within the meaning of the term "compliance order" any order other than one made pursuant to the power conferred by the balance of the words of s137(2).

[37] As Mr Barrett's argument was founded on that proposition, we do not need to decide the other issues he raised.

[38] We find the scheme of the Employment Relations Act 2000 as it applies to this case to be clear. Where parties have concluded an agreement which is enforceable under s149(3), the only means of enforcement available are those provided for in s151. Where, as in this case, the term of the agreement which is found to have been broken does not require the payment of money, the only remedy available to the Authority is to order compliance with the term in question. No other remedies are permitted under s151 and the effect of s149(3)(b) is that the agreement may not be the subject of any form of proceedings other then enforcement proceedings. A compliance order is an order made under s137 and is limited to an order of the type specifically provided for in s137(2). It cannot be made to include

an order for damages or any order related to an order for damage such as an account of profits.

Conclusion

[39] The Authority did not have jurisdiction to make the orders numbered [2], [3] and [4] in its determination dated 24 July 2006 (CA 107/06). The plaintiff's challenge to the making of those orders therefore succeeds and those orders are quashed.

Comment

[40] An issue which concerned us about this case was whether the problems which were the subject of the mediated settlement were within the scope of the statutory mediation provisions of the Employment Relations Act 2000. Those provisions are in Part 10 of the Act, the objects of which are set out in s143. The consistent theme of those objects is that the employment institutions are established to support "employment relationships".

[41] These objects are reflected in s144 which provides that mediation services are to be provided "to support all employment relationships". In December 2004, this was amended by the insertion of s144A which provides that "dispute resolution services" may be provided to "parties in work-related relationships which are not employment relationships".

[42] In this case, mediation took place in January and February 2005. By that time, there had ceased to be any employment relationship between any of the parties. The settlement was also expressed to apply to companies which had never been party to any employment relationships with any other parties. The relationships between the parties were almost entirely commercial and the terms of settlement reflected this. This caused us to doubt whether it could properly be said that the relationships between the parties to the settlement were "work-related".

[43] It was implicit in the Authority's determination that it found the record of settlement had been validly concluded in accordance with the mediation provisions of the Employment Relations Act 2000. This finding was not challenged by either party. Accordingly, we have no jurisdiction to decide this point and do not do so. We wish to make it clear, however, that our decision should not be regarded as an endorsement of that aspect of the Authority's determination.

Costs

[44] We reserve costs. Although this case raised an important issue of statutory interpretation which had been not previously been before the Court, our present inclination is that this ought not to be regarded as a "test case" and that the defendant should make an appropriate contribution to the costs reasonably incurred by the plaintiffs. The parties are encouraged to agree costs if possible. Failing agreement, Mr England is to file and serve a memorandum within 28 days after the date of this judgment with Mr Barrett having a further 28 days to file and serve a memorandum in response.

A A Couch
Judge
for the full Court

Judgment signed at 5.00pm on 29 November 2007